No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE RUTHERFORD INSTITUTE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

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[1] This amicus brief is filed with the parties' consent. Petitioner and Respondent filed their consents on February 18, 2019. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

and forums, and produces the annual Cato Supreme Court Review.

SUMMARY OF ARGUMENT

1. The Fourth Amendment is the constitutional bulwark that protects individuals from unreasonable searches by the government. As is implicit in its text, the ultimate touchstone of the amendment is reasonableness. And, subject only to a few well-delineated and narrowly circumscribed exceptions, the Court has repeatedly held that searches undertaken to discover evidence of criminal wrongdoing are per se unreasonable and thus violate the Fourth Amendment if conducted without a warrant. Accordingly, such warrantless searches ordinarily do not pass constitutional muster.

One recognized exception to this requirement permits warrantless administrative inspections of businesses operating within certain industries subject to pervasive governmental regulations. This Court's jurisprudence teaches, however, that the reach of the "pervasively regulated business" exception is exceedingly limited. It sanctions warrantless searches of only a limited subset of businesses whose owners have a diminished expectation of privacy—if any expectation at all—in the facilities from which they conduct their operations. The Court has further cabined this exception by limiting its application to administrative inspections aimed not at gathering evidence of suspected criminal activity, but rather at verifying compliance with the regulations to which such businesses are subject. The absence of any expectation of privacy or particularized suspicion of criminal wrongdoing are thus foundational elements of the exception.

2. In the decision below, the Wisconsin Supreme Court found no constitutional infirmity in a warrantless search of a person arrested for operating a vehicle while intoxicated, even though the search: (a) included the extraction of the person's blood; (b) was based on an individualized suspicion that the person had committed the criminal act for which he had already been arrested; and (c) was intended to obtain evidence of his guilt. Straining to find a constitutional footing for its decision not to enforce the general rule that a warrantless criminal search is per se unreasonable, a plurality of the Wisconsin Supreme Court sought to rely on the "pervasively regulated business" exception. This was error.

The warrantless search at issue here bears none of the hallmarks of an administrative inspection of a pervasively regulated business. The person searched undeniably had a significant, constitutionally protected expectation of privacy in the integrity of his body. Indeed, the Court has recognized that piercing a person's skin with a syringe to extract blood from his veins implicates the most deep-rooted expectations of privacy a person may hold. Moreover, the search was performed for the specific purpose of obtaining evidence to substantiate the police officer's suspicion that the arrested person had violated Wisconsin's criminal statute prohibiting the operation of a vehicle while intoxicated. This is a far cry from the non-personal, suspicionless administrative inspections that may be conducted without a warrant under the "pervasively regulated business" exception.

3. The plurality below also ignored this Court's repeated guidance that the mere existence of licensing requirements or a potpourri of general regulations is insufficient to invoke the "pervasively regulated busi-

ness" exception. Rather, the exception applies only to businesses within a handful of particular industries for which there are comprehensive regulatory schemes and long histories of extensive government oversight. The Court has repeatedly stymied attempts to broaden the exception beyond these narrow constraints, and this case is but the latest effort at expanding the exception beyond its intended boundaries. If not corrected, the logic on which the plurality's ruling is based would allow the exception to swallow the constitutional rule, as persons participating in any activity that is regulated at the state level or requires a state-issued license would become subject to warrantless searches. If the Fourth Amendment is to be a true guide to constitutionally compliant police action, the decision below must be overturned.

4. The Wisconsin Supreme Court plurality further misconstrued the species of "consent" this Court has sometimes mentioned in its "pervasively regulated business" jurisprudence. Articulating one aspect of the reasoning for the exception, this Court has spoken of business owners' consent to voluntarily embark on businesses in closely-regulated industries. In this way, such owners consent to subject their businesses to the comprehensive regulatory frameworks within which they are required to operate. The plurality below wrongly equated this "consent" to a regulatory framework with a driver's supposed "implied consent"—simply by virtue of having driven a vehicle—to have his person searched for evidence of criminal wrongdoing, up to and including the sort of deeply invasive search at issue here. There is no parallel between these two forms of consent. And the Court's recognition of the former as a reason to forgo the warrant requirement for administrative inspections of pervasively regulated businesses lends no support to the

Wisconsin Supreme Court plurality's finding that the latter somehow renders a warrantless criminal search reasonable.

The Fourth Amendment's demand for pre-search judicial approval is one of the Constitution's great safeguards against arbitrary governmental action. Exceptions to that rule should be reserved for instances which are truly exceptional. That is the approach the Court has consistently followed and it should do so again in this case by finding that the "pervasively regulated business" exception does not apply to the class of search at issue here.

ARGUMENT

I. THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION TO THE WARRANT REQUIREMENT IS A NARROW EXCEPTION THAT THIS COURT HAS REPEATEDLY DECLINED TO EXTEND BEYOND ITS TRADITIONAL SPHERE.

A. Absent an Exception, a Search Is Constitutional Only if Authorized by a Warrant Issued by a Neutral Magistrate.

The Fourth Amendment "gives concrete expression to a right of the people which 'is basic to a free society.'" *Camara v. Mun. Court of City and Cty. of San Francisco*, 387 U.S. 523, 528 (1967) (quoting *Wolf v. People of the State of Colo.*, 338 U.S. 25, 27 (1949)). It guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" *Riley v. California*, 573 U.S. 373, 381–82 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). And "whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (quotation marks and citations omitted).

Furthermore, "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause." *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297, 315 (1972). "Warrants provide the 'detached scrutiny of a neutral magistrate, and thus ensur[e] an objective determination whether an intrusion is justified.'" *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2187–88 (2016) (Sotomayor, J., concurring in part and dissenting in part) (quoting *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 622 (1989)). Warrants therefore "give life to [the Court's] instruction that the Fourth Amendment 'is designed to prevent, not simply to redress, unlawful police action.'" *Id.* at 2188 (quoting *Steagald v. United States*, 451 U.S. 204, 215 (1981)).

In most criminal cases, this Court has balanced individual and governmental interests "in favor of the procedures described in the Warrant Clause." *Skinner*, 489 U.S. at 619. Accordingly, "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia*, 515 U.S. at 653; *see also Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that "searches conducted outside the judicial process, without prior

approval by judge or magistrate, are per se unreasonable under the Fourth Amendment"); *United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes."); *cf. Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978) (observing that "[t]his Court has already held that warrantless searches are generally unreasonable"). Indeed, "[s]earches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause . . . for the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Katz*, 389 U.S. at 357 (quotation marks and internal citations omitted); *see Jeffers*, 342 U.S. at 51 ("[T]he Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended."); *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979) ("The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.").

The reasoning for the warrant requirement was perhaps best summarized by Justice Jackson more than seventy years ago:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the

> often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13–14 (1948).

Following Justice Jackson's logic, the Court has held that "a search of private houses is presumptively unreasonable if conducted without a warrant." *See v. City of Seattle*, 387 U.S. 541, 543 (1967). And, pertinent to the case at bar, because "'[s]earch warrants are ordinarily required for searches of dwellings,' . . . 'absent an emergency, no less could be required where intrusions into the human body are concerned,' even when the search was conducted following a lawful arrest." *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)).

"In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley*, 573 U.S. at 382. But "[b]ecause

securing a warrant before a search is the rule of reasonableness, the warrant requirement is 'subject only to a few specifically established and well-delineated exceptions.'" *Birchfield*, 136 S. Ct. at 2188 (Sotomayor, J., concurring in part and dissenting in part) (quoting *Katz*, 389 U.S. at 357). These exceptions "have been jealously and carefully drawn . . . ." *Jones v. United States*, 357 U.S. 493, 499 (1958). Importantly, because an exception "invariably impinges to some extent on the protective purpose of the Fourth Amendment . . . [,]" the Court has "limited the reach of each exception to that which is necessary to accommodate the needs of society." *Sanders*, 442 U.S. at 759–60; *see Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) ("If it is to be a true guide to constitutional police action, rather than just a pious phrase, then the exceptions cannot be enthroned into the rule.") (quotation marks and citation omitted).

B. The "Pervasively Regulated Business" Exception Is One of the Handful of Narrow and Tightly Circumscribed Exceptions Authorized by This Court.

This Court has recognized an exception to the warrant requirement for certain searches of businesses in "pervasively regulated" industries. Under this exception, legislative schemes authorizing warrantless administrative inspections of commercial property do not necessarily violate the warrant requirement. *See New York v. Burger*, 482 U.S. 691, 702 (1987).

The exception was first recognized in 1970 in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). Since then, the Court has identified only four industries that qualify as "pervasively regulated": (1) liquor sales, (2) firearms dealing, (3) running an automobile junkyard, and (4) mining. *See City of*

Los Angeles v. Patel, 135 S. Ct. 2443, 2454 (2015). "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Marshall*, 436 U.S. at 313. The "close supervision" must be such that a business owner effectively has no reasonable expectation of privacy in the business. *Id.*

A party relying on this exception to validate a search must point to a statute permitting government agents to conduct warrantless searches in the context of a heavily regulated industry, and must demonstrate, *inter alia*, that that statute provides an adequate substitute for a warrant. *Burger*, 482 U.S. at 702–03. To meet this requirement, the "statutory scheme" must put the business owner on notice that his property will be subject to "periodic inspections undertaken for specific purposes" and it must limit the inspectors' discretion to determine which facilities are to be searched and what violations are to be pursued. *Id.* at 703; *Donovan v. Dewey*, 452 U.S. 594, 600, 604 (1981). In short, the statute must provide a "comprehensive and predictable inspection scheme." *Donovan*, 452 U.S. at 600.

Permitted "inspections" under the exception have so far been limited to civil inspections of commercial properties necessary to enforce governing statutes and regulations. Initially, these inspections were of a business's inventory and records regarding its inventory. *See Colonnade*, 397 U.S. at 75–77; *United States v. Biswell*, 406 U.S. 311, 316 (1972). In *Colonnade*, the Court noted in dictum that due to the long history of English and American regulation of the liquor industry, including warrantless inspections of inventories and records to enforce tax laws, "Congress has broad

authority to fashion standards of reasonableness for searches and seizures" of businesses in this "closely regulated industry." 397 U.S. at 77.

Two years later in *Biswell*, the Court held that businesses engaged in firearms dealing were subject to warrantless inspections of their records, firearms, and ammunition for compliance with gun control laws. 406 U.S. at 316–317. The Court noted that while government regulation of firearms dealers was not as deeply rooted in history as regulation of liquor sales, the regulations were comprehensive and each federally licensed firearms dealer was "annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority." *Id.* at 316.

In 1981, the Court expanded the exception to include inspections designed to identify health and safety issues in mining operations. *Donovan*, 452 U.S. at 606. In doing so, the Court emphasized that the statute at issue, like the gun control regulations at issue in *Biswell*, "establishe[d] a predictable and guided federal regulatory presence" clearly defining the scope and frequency of inspections that would apply to all mines. *Id.* at 604.

The Court returned to the roots of the exception in 1987, holding in *Burger* that businesses running an automobile junkyard were subject to warrantless inspections of their inventory and records. 482 U.S. at 712. The Court remarked that these businesses were part of the "junk-related" industry that had long been subject to extensive government regulations including record keeping requirements and warrantless inspections of records and inventory. *Id.* at 705–07.

Importantly, however, the Court has repeatedly emphasized that the "pervasively regulated" industry

is the exception, not the rule. *See Patel*, 135 S. Ct. at 2455; *Marshall*, 436 U.S. at 313–14. And it has on multiple occasions declined to expand the reach of the exception to encompass warrantless searches in other contexts. *See Patel*, 135 S. Ct. at 2456–57; *Marshall*, 436 U.S. at 324–25.

In *Patel*, for example, the Court declined to apply the exception to the hotel industry, holding that doing so "would permit what has always been a narrow exception to swallow the rule." 135 S. Ct. at 2455. The Court acknowledged that while hotels are subject to a variety of regulations regarding maintaining licenses, collecting taxes, conspicuously posting their rates, and meeting sanitary standards and that there is even a long history of laws obligating hotels to provide "suitable lodging" to paying guests, this "hodgepodge of regulations" does not constitute a "comprehensive [regulatory] scheme." *Id.*

Likewise, in *Marshall*, the Court rejected a bid to extend the "pervasively regulated business" exception to all employment facilities subject to the Occupational Safety and Health Act ("OSHA"). 436 U.S. at 321–25. Emphasizing the limited reach of the exception, the Court held that general regulations like minimum wage and maximum hour regulations are not sufficient to invoke the exception. *Id.* at 313–15.

While this exception is well established, the Court's application of it has been reserved for a specific set of "unique circumstance[s]." *Marshall*, 436 U.S. at 313. The Wisconsin Supreme Court plurality, however, sought to apply the rationale underlying the exception to an entirely new category of searches far beyond anything this Court has envisioned in any past decision.

II. THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION CANNOT SUPPORT A SUSPICION-BASED SEARCH INITIATED TO GATHER EVIDENCE OF CRIMINAL CONDUCT.

In the decision under review, a plurality of the Wisconsin Supreme Court relied on the "pervasively regulated business" exception by analogizing Wisconsin's licensing requirements and driving regulations to the regulatory frameworks controlling the liquor, mining, junkyard, and firearms industries. *State v. Mitchell*, 914 N.W.2d 151, 157–68 (Wisc. 2018). Ultimately, the plurality concluded that consent to search attributed to motorists under Wisconsin's implied-consent laws is "voluntary . . . similar to the voluntariness of consent" attributed to pervasively-regulated businesses. *Id.* at 157–59, 163.

The plurality's reliance on the "pervasively regulated business" exception was misplaced. In its haste to justify resorting to the exception, the court disregarded two core principles that animate the exception. First, the exception applies only in industries where, by virtue of the comprehensive nature of the statutory scheme, the proprietor lacks any reasonable expectation of privacy. Second, the search must be conducted pursuant to a scheme that provides for suspicionless, warrantless inspections; said otherwise, the search must be for a purpose other than to gather evidence of criminal wrongdoing. The Wisconsin Supreme Court plurality ignored each of these necessary preconditions for the exception's application. It therefore erred in relying on the exception for "pervasively regulated businesses" and its decision should be reversed.

A. The "Pervasively Regulated Business" Exception Is Based on the Business Owner's Lack of Any Reasonable Expectation of Privacy.

First, this Court has restricted the "pervasively regulated business" exception to searches of certain businesses that are so heavily regulated that the owner of such a business does not have an expectation of privacy in the business. The exception "is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." *Burger*, 482 U.S. at 701 (quoting *Donovan*, 452 U.S. at 606).

This Court has recognized that not all expectations of privacy are created equal; rather, some are greater than others. For instance, although both a homeowner and a business's proprietor have a reasonable expectation of privacy in their respective properties, the expectation of privacy in commercial premises "is different from, and indeed less than, a similar expectation in an individual's home." *Id.* at 700. And, critically for the present case, this Court has also explained that the expectation of privacy in commercial property in a "closely regulated" industry is even lower than the expectation of privacy in commercial property generally. *Id.* In fact, the Court has held that there is no expectation of privacy in such property: "[pervasively regulated] industries have such a history of government oversight that ***no reasonable expectation of privacy*** . . . could exist for a proprietor over the stock of such an enterprise." *Marshall*, 436 U.S. at 313 (emphasis added).

At the opposite end of the spectrum is an individual's expectation of privacy in his own person—the expectation to be free from physical intrusions into

one's body. Indeed, an invasion of bodily integrity "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 569 U.S. at 148 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)). Accordingly, "the importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'" *Id.* (quoting *Schmerber*, 384 U.S. at 770).

The diminished expectation of privacy of a business owner in a "pervasively regulated" business is a core tenet of the exception permitting warrantless searches of such businesses: Because there is little or no expectation of privacy in such settings, it is possible that a particular search—if properly limited in scope and purpose—could be found reasonable notwithstanding the absence of a magistrate's imprimatur. *Burger*, 482 U.S. at 702. While this reduced expectation of privacy does not, in and of itself, permit a warrantless search of such a business, it is a necessary precondition—and one that is wholly lacking here.

The Wisconsin Supreme Court plurality therefore erred, because unlike the owner of a pervasively regulated business, the individual searched here had a "significant, constitutionally-protected privacy interest[ ]" in being free from compelled intrusions into his body. *McNeely*, 569 U.S. at 159. Put otherwise, even though the search at issue implicated the greatest and "most deeply-rooted" privacy interest a person may hold, the plurality dispensed with the Fourth Amendment warrant requirement by applying an exception that is founded on the absence of any expectation of privacy. This apples-to-elephants analysis cannot stand.

B. The "Pervasively Regulated Business" Exception Permits "Administrative Inspections," Not Criminal Searches.

The Wisconsin Supreme Court plurality also disregarded the material distinctions between the purpose and scope of searches permitted under the "pervasively regulated business" exception and the purposes and scope of the search at issue.

The "pervasively regulated business" exception is a subset of the "administrative search" doctrine. *See Patel*, 135 S. Ct. at 2454. That doctrine permits warrantless searches—often referred to as "administrative inspections"—where the "primary purpose" of the search is "'[d]istinguishable from the general interest in crime control.'" *Id.* at 2452 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)). The rationale underlying the administrative search doctrine is that such administrative searches "are neither personal in nature nor aimed at the discovery of evidence of crime" and therefore involve "a relatively limited invasion of . . . privacy." *Camara*, 387 U.S. at 537.

Administrative searches are not personal in nature because they are not based on suspicion of any violation. *See Edmond*, 531 U.S. at 37. While a search is ordinarily unreasonable "in the absence of individualized suspicion of wrongdoing[,]" this Court has recognized a few limited circumstances where the usual rule does not apply: (1) "certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement"; and (2) "searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited." *Id.* Administrative searches, including those of "perva-

sively regulated" businesses fall under the latter heading. *Id.*

The "suspicionless" nature of an administrative search is essential to its constitutionality. Without any particularized suspicion of wrongdoing, the "reasonableness" of such a search rises or falls on the reasonableness of the "regulatory scheme" authorizing the search. *See, e.g.*, *Burger*, 482 U.S. at 702–03; *Camara*, 387 U.S. at 534–36. As one court has explained, "a regulatory inspection is not premised on an officer's on-the-spot perception that he has an individualized suspicion that the specific individual to be seized and searched is involved in criminal activity. . . . [It] is instead premised on the individual subject to the warrantless seizure and search ***knowingly and voluntarily engaging in a pervasively regulated business***, and ***on the existence of a statutory scheme*** that puts that individual on notice that he will be subject to warrantless administrative seizures and searches." *United States v. Herrera*, 444 F.3d 1238, 1246 (10th Cir. 2006) (emphasis added). The applicable regulations, or "statutory scheme," must make the business owner aware that his property will be subject to "periodic inspections undertaken for specific purposes," *Burger*, 482 U.S. at 703, and must limit the inspectors' discretion to determine which facilities are to be searched and what violations are to be pursued, *Donovan*, 452 U.S. at 604. In short, the inspections must be standardized and predictable.

Furthermore, the purpose of a suspicionless administrative inspection is not to investigate violations of criminal laws. *See Patel*, 135 S. Ct. at 2452; *Michigan v. Clifford*, 464 U.S. 287, 292, 294 (1984) (in fire investigation, the constitutionality of a post-fire inspection depends upon "whether the object of the search is

to determine the cause of the fire or to gather evidence of criminal activity"). Rather, they are aimed at verifying compliance with statutes or administrative regulations. *See, e.g.*, *Camara*, 387 U.S. at 535–38 (housing code inspection); *Donovan*, 452 U.S. at 599–605 (unannounced inspection of a mine for compliance with health and safety standards); *Michigan v. Tyler*, 436 U.S. 499, 507–09 (1978) (inspection of a fire-damaged premises to determine the cause of the fire).[2]

This Court has thus drawn a clear line distinguishing "administrative searches" from "traditional police searches conducted for the gathering of criminal evidence." *See Burger*, 482 U.S. at 699–700 (explaining that individuals and businesses owners have an expectation of privacy "not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes"). This distinction is critical to identifying and enforcing the outer bounds of the exception—and thus the class of situations to which it may be applied. It also harkens back to the threshold requirement of a reduced expectation of privacy. Because an administrative search is not an effort to unearth evidence of suspected criminal behavior, it does not implicate the privacy concerns that a criminal search would, by necessity, call into question.

The Wisconsin Supreme Court plurality's application of the "pervasively regulated business" exception to support its holding here cannot be reconciled with

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[2] The Court has also upheld some warrantless "checkpoint" stops as constitutional under the administrative search exception but only when the stops were "suspicionless" and the "primary purpose" was distinguishable from "detect[ing] evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 37–38.

the foundational principles on which the exception rests. The "pervasively regulated business" exception applies to searches for civil purposes, whereas the only purpose of the search at issue was to gather evidence of a suspected crime. And the search was certainly not "suspicionless"—to the contrary, it was wholly based on the arresting officer's individualized suspicion of a particular crime.

III. GENERAL LICENSING REQUIREMENTS AND DRIVING REGULATIONS DO NOT RISE TO THE LEVEL OF GOVERNMENTAL REGULATION NECESSARY TO TRIGGER THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION.

As noted above, this Court has limited the application of the "pervasively regulated business" exception to businesses in four industries: (1) liquor sales, (2) firearms dealing, (3) mining, and (4) running an automobile junkyard. *See Patel*, 135 S. Ct. at 2454. And it has declined to extend the exception to hotel owners or all employers regulated by OSHA. *See id.* at 2456–57; *Marshall*, 436 U.S. at 324–25.

In circumscribing the reach of the exception, the Court has emphasized that mere licensing requirements and evidence of general regulations do not trigger its application, because, "[i]f such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Patel*, 135 S. Ct. at 2455. Rather, a distinct "comprehensive regulatory scheme" that puts the business owner on notice that his "property will be subject to periodic inspections undertaken for specific purposes" is required. *Burger*, 482 U.S. at 703.

For instance, in *Patel*, the Court declined to apply the "pervasively regulated business" exception to the hotel industry. 135 S. Ct. at 2455. The Court noted that, although hotels were subject to a variety of regulations regarding maintaining licenses, collecting taxes, conspicuously posting their rates, and meeting sanitary standards and that there was even a long history of laws obligating hotels to provide "suitable lodging" to paying guests, this "hodgepodge of regulations" did not constitute a "comprehensive [regulatory] scheme." *Id.* The Court characterized these regulations as "general regulations" that, if held sufficient to invoke the exception, would make it "hard to imagine a type of business that would not qualify" for the exception. *Id.* The Court emphasized that only a regulatory scheme that put hotel owners on notice that they would be subject to "periodic inspections undertaken for a specific purpose" would potentially trigger the exception. *Id.*

The Court has further explained that the history and extent of government oversight over industries that fall within this exception must be such that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation." *Marshall*, 436 U.S. at 313. Applying this principle, the Court in *Marshall* rejected a bid to extend the "pervasively regulated business" exception to all employment facilities subject to OSHA. 436 U.S. at 313–15. There, the Secretary of Labor argued that its agents should be permitted to conduct warrantless searches of any employment facility under the jurisdiction of OSHA pursuant to the exception because "all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions." *Id.* at 313–14. The Secretary specifically pointed to minimum wage and maximum hours requirements to

support its claim that these businesses were "pervasively regulated." *Id.* at 314. Emphasizing the limited reach of the exception, the Court held that such regulations were neither sufficiently pervasive nor sufficiently longstanding to support applying the exception to virtually all American businesses. *Id.* at 313–15.

In the plurality opinion below, the Wisconsin Supreme Court effectively imposes on motorists the same burden placed on owners of pervasively regulated businesses. The court's unsupportable logic would extend to anyone who gets behind the wheel of a vehicle within Wisconsin's borders, regardless of where the driver resides or where the trip originated, based on "general regulations" akin to those this Court found in *Patel* and *Marshall* were insufficient to invoke the pervasively regulated business exception. To support its holding, the court cited Wisconsin's history of licensing requirements and general driving regulations and asserted that they were similar to the regulatory frameworks controlling "pervasively regulated businesses." But the regulations it relied on are much closer to those at issue in *Patel* and *Marshall*. They amount to some licensing requirements and a "hodgepodge" of general driving regulations, which is exactly what this Court held in *Patel* was insufficient. Further, if Wisconsin's driving regulations were sufficient, ***any*** state-licensed activity would be ripe for the same treatment, including, for example, the activities of doctors, lawyers, teachers, and hunters, just to name a few. All are subject to license requirements and general regulations. But those regulations—like the regulations applicable to drivers—do not implicate the unique circumstances the exception was created to address.

In addition, it bears noting that this Court has previously rejected an attempt to apply the reasoning

of the "pervasively regulated business" exception to motorists. *See Almeida-Sanchez v. United States,* 413 U.S. 266, 267–72 (1973). In *Almeida-Sanchez*, the government relied on the rationale for the "pervasively regulated business" exception to validate a warrantless, suspicionless search of an automobile by a roving patrol on a road that lies "at all points at least 20 miles north of the Mexican border" seeking illegal entrants into the United States. *Id.* While the search at issue in *Almeida-Sanchez* at least satisfied the requirement that it be suspicionless (unlike the search at issue here), the Court summarily dismissed the government's attempt to apply the rationale for the "pervasively regulated business" exception to motorists, noting that a motorist is not engaged in any "regulated or licensed business." *Id.* at 271.

Simply put, the "pervasively regulated business" exception and its rationale have no application to individuals or searches for criminal violations. The exception was developed for a unique situation involving a small subset of businesses in heavily-regulated industries and it permits only a specific type of inspection to enforce the civil regulations to which those businesses are subject.

IV. THE WISCONSIN SUPREME COURT MISCONSTRUED THE "CONSENT" AT ISSUE IN THE "PERVASIVELY REGULATED BUSINESS" EXCEPTION.

One last point bears brief mention. The Wisconsin Supreme Court plurality construed this Court's "pervasively regulated business" case law as holding that business owners subject to the exception voluntarily consented to administrative searches, thereby making such searches permissible. But that interpretation seriously misconstrues the Court's precedent in this area.

The legality of a warrantless search under the "pervasively regulated business" exception is not premised on the business owner's consent. Rather, administrative inspections are legal (or illegal) based on whether the regulatory scheme at issue complies with the requirements the Court has articulated for the exception to be properly applied. In other words, "the legality of the search depends not on consent but on the authority of a valid statute." *Biswell*, 406 U.S. at 315.

The "consent" that this Court has mentioned in its "pervasively regulated business" decisions is the business owner's voluntary choice to embark upon a business in a closely regulated industry. *Marshall*, 436 U.S. at 313. That "consent" has not been held to support a warrantless search under the "pervasively regulated business" exception and is not the sort of "consent" required to support a warrantless search to ferret out evidence of wrongdoing in a criminal investigation.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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